

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINTS UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

Nos. 10-18-90038 through 10-18-90067,
10-18-90069 through 10-18-90107
and 10-18-90109 through 10-18-90122

Before **TYMKOVICH**, Chief Circuit Judge, **KELLY, LUCERO, BRISCOE**, Circuit
Judges, **BRIMMER, SKAVDAHL, WADDOUPS**, and **DOWDELL**, District Judges

ORDER

Complaints of judicial misconduct have been filed against Supreme Court Justice Brett M. Kavanaugh, formerly a circuit judge on the U.S. Court of Appeals for the District of Columbia Circuit.¹ The complaints were filed pursuant to the Judicial Conduct and Disability Act, 28 U.S.C. § 351 *et seq.*

In response to a request from the Judicial Council of the D.C. Circuit, Chief Justice John G. Roberts Jr. on October 10, 2018 transferred the complaints and any pending or new complaints relating to the same subject matter from the D.C. Circuit to the Tenth Circuit Judicial Council. *See* Rules for Judicial-Conduct and Judicial-

¹ Given the publicity this matter has already received, the Judicial Council has determined that it is in the public interest to make the identity of the subject judge known. *See* Rules for Judicial-Conduct and Judicial-Disability Proceedings Rule 24(a)(2) (Jud. Conf. of the U.S. 2015). Ordinarily, orders in misconduct matters are made public only when final action on the complaint has been taken and any right of review has been exhausted. Nevertheless, because the public is already aware of the existence of this matter and for the purpose of transparency, we have decided to make this order public before appeal rights have been exhausted. *See* Rule 23(a), 24(a); *see also* Rule 2.

Disability Proceedings, Rule 26 (Jud. Conf. of the U.S. 2015). We have consolidated the 83 complaints filed to date in the D.C. and Tenth Circuits.²

Complainants' allegations vary, but in addition to some miscellaneous assertions, they generally allege that Justice Kavanaugh made false statements during his nomination proceedings to the D.C. Circuit in 2004 and 2006 and to the Supreme Court in 2018; made inappropriate partisan statements that demonstrate bias and a lack of judicial temperament; and treated members of the Senate Judiciary Committee with disrespect.

Following the transfer by the Chief Justice, the Tenth Circuit Judicial Council has retained the matter and assumed the initial role ordinarily assigned to the chief circuit judge under 28 U.S.C. § 352(a)–(b) and Rule 11. *See* Rule 26 cmt. (the transferee judicial council "shall determine the proper stage at which to begin consideration of the complaint"); *In re Complaint of Judicial Misconduct*, No. 17-90018 (2nd Cir. 2017) (resolving through initial analysis by full judicial council complaint transferred to it by Chief Justice under Rule 26). This Order remains subject to any appeal rights available to complainants pursuant to the Rules. For the reasons set forth below, the complaints must be dismissed because, due to his elevation to the Supreme Court, Justice Kavanaugh is no longer a judge covered by the Act. *See* 28 U.S.C. § 352(b)(1)(A)(i).

² Complainants identify themselves as lawyers, doctors, professors, and concerned citizens, among others. Complainants are referred to in the aggregate throughout the Order. We have greatly liberalized our standards for accepting complaints, to the extent that we have even accepted postcards as long as they identify the complainant.

I. Background

Justice Kavanaugh was nominated to the D.C. Circuit in 2003. He provided testimony to the Senate Judiciary Committee in 2004, but his nomination was not acted upon. He was renominated in 2006, provided additional testimony to the Committee, and was confirmed to the D.C. Circuit in May 2006.

On July 9, 2018, Justice Kavanaugh was nominated to the United States Supreme Court. The Senate Judiciary Committee began Justice Kavanaugh's confirmation hearing on September 4, 2018. The hearing concluded on September 7, but after allegations of misconduct were raised prior to his confirmation vote, the Senate Judiciary Committee postponed the vote and took an additional day of testimony on September 27. After the additional testimony, the Senate Judiciary Committee voted to send the nomination to the full Senate pending an updated FBI background investigation. On October 6, the Senate voted to confirm Justice Kavanaugh's nomination to the Supreme Court.

Justice Kavanaugh was sworn in and became a member of the Supreme Court on October 6, 2018.

II. Complaints

Most of the complaints filed against Justice Kavanaugh include allegations that he made false statements under oath, both during his D.C. Circuit confirmation hearings in 2004 and 2006, and during his Supreme Court confirmation hearing in 2018.

The complaints generally allege that Justice Kavanaugh in his appearances before the Senate Judiciary Committee (1) falsely testified about his involvement in various

events or programs while he was Assistant White House Counsel and Secretary to the President during the George W. Bush administration; (2) falsely testified about his personal conduct, behavior, and recollection of events prior to his joining the federal judiciary; and (3) displayed partisan bias and a lack of appropriate judicial temperament. Some complaints allege he engaged in misconduct while he was a judge on the D.C. Court of Appeals by favoring certain parties or interests.³ In sum, the complaints together allege that Justice Kavanaugh violated the Code of Conduct for United States Judges, Canon 1 (Jud. Conf. of the U.S. 2014) (providing “[a] judge should maintain and enforce high standards of conduct and should personally observe those standards”), Canon 2 and commentary (providing that “[a] judge should avoid impropriety and the appearance of impropriety in all activities” and defining the appearance of impropriety as “when reasonable minds . . . would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired”), Canon 4 (providing “a judge should not participate in extrajudicial activities that . . . reflect adversely on the judge’s impartiality”), and Canon 5 (providing “[a] judge should refrain from political activity”), among others.

³ On October 6, 2018, D.C. Circuit Judge Karen LeCraft Henderson issued a statement indicating that none of the complaints as of that date pertained to any conduct in which Justice Kavanaugh engaged in as a judge on the D.C. Court of Appeals. The complaints referenced in this section were filed after Judge Henderson’s statement.

We are disclosing copies of the complaints, with complainants' names and other identifying information redacted. *See* Rule 23(g) & cmt.⁴ They are available at <https://www.ca10.uscourts.gov/ce/misconduct/kavanaugh-complaints>.

III. Analysis

The Judicial Conduct and Disability Act covers judicial misconduct and provides procedures for handling misconduct complaints. The Rules for Judicial-Conduct and Judicial-Disability Proceedings implementing the Act further provide guidance on what conduct may constitute misconduct and the process for handling misconduct complaints. *See, e.g.*, Rule 3.

The Act addresses "complaints" and defines the term "judge." With respect to complaints, the Act provides,

Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

28 U.S.C. § 351(a). The Act defines the term "judge" as "*a circuit judge, district judge, bankruptcy judge, or magistrate judge*," *id.* § 351(d)(1) (emphasis added). Rule 4 further explains that "[a] complaint under these Rules may concern the

⁴ Supplemental materials and information not concerning Justice Kavanaugh are not included.

actions or capacity *only* of judges of United States courts of appeals, judges of the United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and [judges of certain specialty courts]" (emphasis added).⁵ Neither the Act nor the Rules apply to justices of the United States Supreme Court.

Under the Act, Congress has given the Judiciary the authority to investigate and discipline judges, but at the same time has circumscribed that authority. Significantly, the Act gives the Judiciary the power only to resolve complaints concerning the conduct of *covered judges*, *i.e.*, "a circuit judge, district judge, bankruptcy judge, or magistrate judge." 28 U.S.C. § 351(d)(1); Rule 4. The Act thus applies only to complaints that allege one of those covered judges "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). In addition, the Act and Rules provide that a misconduct proceeding can be concluded because of "intervening events," namely, circumstances where an individual is no longer a covered judge. *See id.* § 352(b)(2); Rule 11(e) & cmt. As a result, § 351(a) effectively precludes

⁵ Rule 8(c) provides "[i]f the circuit clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint under these Rules." Complaints were filed both before and after Justice Kavanaugh was confirmed to the Supreme Court. Because of the significant public interest in this matter and for the sake of transparency, all complaints filed through December 13, 2018 relating to Justice Kavanaugh have been accepted for filing and addressed in this Order.

action against an individual who is no longer a circuit, district, bankruptcy or magistrate judge.

Decisions from this and other circuits are consistent with this conclusion. The Act covers individuals only while they are circuit, district, bankruptcy or magistrate judges, even if the alleged misconduct occurred during the time the judge was covered under the Act. *See, e.g., In re: Complaint Under the Judicial Conduct and Disability Act*, No. 10-17-90008, Order at 2 (10th Cir. 2017) (dismissing a complaint against a judge because of an intervening event); *In re Complaint of Judicial Misconduct*, No. 17-90118, Order at 2–3 (2d Cir. 2017) (concluding a complaint due to intervening events because the judge resigned); *Petition of John Doe*, 207 F.3d 1102, 1104 (8th Cir. 2000) (“As to Justice Thomas, the complaint will be dismissed for lack of jurisdiction. The [28 U.S.C. § 351(a)] process does not apply to Justices of the Supreme Court.”); *see also In re: Complaint Under the Judicial Conduct and Disability Act*, Nos. 10-16-90009 & 10-16-90017, Order at 14 (10th Cir. 2017) (determining that pre-appointment conduct is not cognizable within the scope of the Act). Although the commentary to Rule 11(e) states that a judge remains subject to the Act as long as he or she “performs judicial duties,” those judicial duties must still fall within the jurisdiction of the Act; that is, they must be the duties of a covered circuit, district, bankruptcy or magistrate judge. *See Judicial Conduct & Disability Act Study Comm., Implementation of the Judicial Conduct and Disability Act of 1980: A*

Report to the Chief Justice, 239 F.R.D. 116, app. E at 245 (West 2006) (“Breyer Report”) (explaining that this standard applies to a judge who steps down from administrative duties, but retains duties as a circuit, district, bankruptcy, or magistrate judge). In sum, neither the Act nor the Rules provides for misconduct proceedings against an individual not covered by the Act.

The context and history of the Act confirm this interpretation. When Congress intends to, it expressly covers Supreme Court justices in other statutory provisions. In 28 U.S.C. § 455, for example, Congress provided that judicial disqualification standards apply to “[a]ny justice, judge, or magistrate judge of the United States” (emphasis added). Other examples where Congress extended statutory coverage to Supreme Court justices can be found in 28 U.S.C. §§ 296, 371, 372, 454, 456, 626, 1651, 2243. Most importantly, Congress considered, but ultimately rejected, a statutory amendment that would have explicitly extended the Judicial Conduct and Disability Act to justices of the Supreme Court. *See* 125 Cong. Rec. 30,080–30,094 (1979).

In conclusion, Congress has not extended the Judicial Conduct and Disability Act to Supreme Court justices.

Justice Kavanaugh served as a circuit judge on the D.C. Circuit from May 30, 2006 to October 5, 2018. He was elevated to the Supreme Court of the United States on October 6, 2018. Because Justice Kavanaugh is no longer a circuit,

district, bankruptcy or magistrate judge, a circuit judicial council no longer has the power or jurisdiction under the Act to review his conduct.⁶

The allegations contained in the complaints are serious, but the Judicial Council is obligated to adhere to the Act. Lacking statutory authority to do anything more, the complaints must be dismissed because an intervening event—Justice Kavanaugh’s confirmation to the Supreme Court—has made the complaints no longer appropriate for consideration under the Act. 28 U.S.C. § 352(b)(1)(A)(i) (providing for dismissal of a complaint if the complaint is not in conformity with § 351(a)). Because it lacks jurisdiction to do so, the Council makes no findings on the merits of the complaints.

The importance of ensuring that governing bodies with clear jurisdiction are aware of the complaints should also be acknowledged. *See Nat'l Comm'n on Judicial Discipline and Removal, Report of the Nat'l Comm'n on Judicial Discipline & Removal*, 152 F.R.D. 265, 342–43 (1994). Accordingly, we request that the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States forward a copy of this Order to any relevant Congressional committees for their information.

The Circuit Executive is directed to transmit this Order to the complainants and copies to Justice Kavanaugh and the Judicial Conference Committee on Judicial Conduct

⁶ Additionally, insofar as some complainants make allegations against Senators, the President, the FBI, or other non-judges, those allegations are not appropriate for consideration under the Act. *See Rule 4* (defining the scope of the Rules).

and Disability. *See* Rule 11(g)(2). As with any misconduct complaint, under 28 U.S.C. § 352(c) and Rule 11(g)(3), any complainant has a right to seek review of this Order by filing a petition for review by the Judicial Council as provided in Rule 18(a) and (b). Should any complainant petition for review, the Judicial Council must consider the petition in accordance with Rule 19. Any such petition must be filed with the Office of the Circuit Executive within 42 days after the date of this Order. *See* Rule 18(b); 10th Cir. Misconduct Rule 8.1.

So ORDERED, December 18, 2018, and
Entered on behalf of the Judicial Council
Of the Tenth Circuit*

By:


Honorable Timothy M. Tymkovich
Chief Circuit Judge

* The Honorable Harris L Hartz is a member of the Judicial Council but did not participate in the consideration of this matter.